No. 77-1531

In the Supreme Court of the United States

OCTOBER TERM, 1977

HERBERT DAVID SCHIFFMAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, Herbert David Schiffman, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming the judgment of the United States District Court for the Northern District of Georgia, Atlanta Division, sentencing the petitioner to three years probation upon a jury verdict of guilty of having violated 29 U.S.C. 186(b)(1), that is a union official receiving a thing of value from an employer.

OPINION BELOW

The opinion of the Court of Appeals is not reported, but is printed in the appendix to this Petition (Appendix "A"). The opinion of the Court of Appeals was entered on May 26, 1977. A Petition For Rehearing was denied by order entered June 29, 1977 (Appendix "B").

JURISDICTION

The judgment of the Court of Appeals was entered on May 26, 1977. Petition for Rehearing was denied on June 29, 1977 (Appendix "B").

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTES AND RULES

29 U.S.C. 186

§186. Restrictions on payments and loans to employee representatives, labor organizations, officers and employees of labor organizations, and to employees or groups or committees of employees; exceptions; penalties; jurisdiction; effective date; exception of certain trust funds

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, any money or other thing of value.

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

• • •

(c) The provisions of this section shall not be applicable.

• • •

(3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; • • •"

Rule 52(b) Federal Rules of Criminal Procedure

"(b) *Plain Error.* Plain error or defects affecting substantial rights may be notices although they were not brought to the attention of the Court."

Rule 103(d) Federal Rules of Evidence

"(d) *Plain Error.* Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the Court."

QUESTIONS PRESENTED

1. Where testimony of a government witness of the hearsay opinion of a lawyer that the facts at issue constitute a violation of the law is heard by the jury, has a defendant been denied his Sixth Amendment rights to confrontation and a fair trial by an impartial jury, and his Fifth Amendment to due process of law?

2. Is reversible error committed where the trial court fails to respond to an inquiry from the jury concerning the language of the statute involved including the statutory exemptions?

3. Did the government fail to meet its constitutional requirement of proving the defendant guilty beyond a reasonable doubt?

STATEMENT OF THE CASE

NATURE OF THE CASE AND ITS DISPOSITION

The petitioner Herbert David Schiffman was indicted in the United States District Court for the Northern District of Georgia, Atlanta Division in indictment No. CR 75-457A filed November 19, 1975, and charged in a single count of having violated 29 U.S.C. 186(b)(1) in that it was alleged that on or about June 21, 1973, through on or about April 13, 1974, the petitioner being a union official

of both a local Hotel, Motel and Restaurant Employers Union and of the Hotel and Restaurant Employees and Bartenders International Union, being representatives of employees of the Regency Hyatt House, who were employed in an industry affecting commerce, "did unlawfully, willfully, and knowingly request, demand, receive and accept and agree to receive and accept a thing of value, to wit: a discounted hotel room rate amounting to approximately fourteen hundred and twenty-five dollars ($1,425.00) from the aforesaid Regency Hyatt House." (R 5)

Petitioner upon his plea of not guilty was tried before a jury in a three day trial from June 7, 1976 through June 9, 1976. (R 2-3)

The jury returned a verdict of guilty. (R 3)

The Petitioner timely filed post-trial motions which were denied. (R 62-66, 67, 68-73, 85-88, 84)

On September 14, 1976, the Court suspended imposition of sentence and placed the petitioner on three years probation. (R 92)

Notice Of Appeal was timely filed. (R 93)

The United States Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court by opinion dated May 26, 1977, (Appendix "A") and denied Rehearing by order dated June 29, 1977, (Appendix "B").

STATEMENT OF FACTS

Herbert David Schiffman who is also known as "Pinky" Schiffman is a vice president of the Hotel and Restaurant Employees and Bartenders International Union (hereinafter referred to as the "International") and was president of a local in Florida, (Tr. p. 117). He came to At-

lanta as the administrative agent for Local 151 of the Hotel, Motel and Restaurant Employers Union in Atlanta (hereinafter called the "Local") (Tr. p. 127) which was being held in a sort of trusteeship in about June, 1973. He also came in the position of an organizer for the International in connection with a campaign to organize certain hotels in Atlanta. (Tr. 131-132)

Schiffman and a number of other organizers who came to Atlanta stayed at the Regency Hyatt House since it was the only major hotel in Atlanta that was union organized. (Tr. 137)

There was a collective bargaining agreement between the Regency Hyatt House and the Local (Gov. Ex. 30) and perhaps 50 percent of the employees of the Regency Hyatt House were members of the Local. (Tr. 37)

Shortly after Schiffman arrived in Atlanta he spoke to David C. Botbol who was then the general manager of the Regency Hyatt House and at that time told Botbol that "several of the executives of the Union would be coming in and out in numbers and therefore they wanted a rate". (Tr. 42) Botbol recalled that he offered a rate and that Schiffman asked for a better rate and that the rate then became $16.00 a night for Schiffman and other union members in his party. (Tr. 43) Botbol recalled that Schiffman told him that a number of people would come in and that they were coming in to engage in a major union organizing campaign. Botbol further testified that he gave the rate as a casual and customary thing (Tr. 58) and that it was given in consideration of the economic benefits to the hotel. (Tr. 57)

It was established that the regular rate for the rooms in question would have been from $30.00 to $37.00. (Tr. 90) By regular rate it was meant the rate given anyone

who would walk in off the street. However there were numerous discount rates normally offered by the Hyatt Regency including a discount rate of up to 50 percent off the established rate. (Tr. 94) In addition the general manager was always free to negotiate any rate he determined to be proper. (Tr. 52, 97, 215)

Testimony was offered that the difference between the "regular rate" and the $16.00 rate Schiffman received amounted to approximately $1,378.00 for the 80 nights Schiffman stayed at the Regency Hyatt House during the indictment period. (Tr. 91)

The government further offered evidence that International vice presidents received $50.00 a day "per diem" which was to be used to cover their hotel, food and lodging. (Tr. 177-178)

The defense offered evidence that other hotels customarily offer discount rates to groups and organizations and that rates are generally within the discretion of the manager and depends upon the economic benefit to the hotel, the time of year and how badly the hotel needs bodies. (Tr. 251-252) The defense also impeached the testimony of government witness Darrell Hartley-Leonard by showing that during the period of Schiffman's stay in Atlanta there was a renegotiation of the Regency Hyatt House collective bargaining agreement resulting in an addendum increasing various wages even though the contract was not up and also contained a no-strike clause. (Tr. 255-259)

REASONS FOR GRANTING THE WRIT

The Fifth Circuit Court of Appeals has ignored its own prior rulings and rulings of other circuits by refusing to hold that a government witness' hearsay testimony of the opinion of an attorney that the facts in this case constituted a violation of the law is plain reversible error and this Court should review the Fifth Circuit's decision.

Further, the Fifth Circuit has ignored the previous holdings of this Court to the effect that the trial judge must respond to an inquiry from the jury.

The petitioner further suggests that this Court should review the Fifth Circuit's holding regarding the proof in this case as to whether the facts in this case fell within the statutory exemption.

ARGUMENT

I.

IT WAS PLAIN ERROR FOR THE TRIAL COURT TO FAIL TO DECLARE A MISTRIAL ON ITS OWN MOTION WHEN A GOVERNMENT WITNESS TESTIFIED TO A HEARSAY, IRRELEVANT AND IMMATERIAL OPINION OF AN ATTORNEY THAT THE ACTS INVOLVED IN THIS CASE CONSTITUTED A CRIME.

Darrell Hartley-Leonard, a government witness who at the time of trial was the general manager of the Atlanta Regency Hyatt House testified on direct examination regarding the room discount to Schiffman in part as follows:

> "* * * So I called Art Stokes, *who is our attorney from Branch and Swan,* who have been our attorneys ever since we've been in town. Art Stokes said something to the effect of 'Hell yes. *It's illegal.* It's against a thing called the Taft-Hartley Act, and find out where it came from.'" (Emphasis added) (Tr. 202)

Defense counsel failed to object to this testimony.

However, both Rule 52(b), F.R.C.P. which provides:

> "(b) *Plain Error.* Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court".

and Rule 103(d) of the Federal Rules of Evidence which provides:

> "(d) *Plain Error.* Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the Court".

give relief to a defendant whose right to a fair trial has been vitiated by irrelevant, immaterial hearsay evidence which has clearly prejudiced him before the jury even though he failed to object to that evidence. It might be noted that the defendant did raise this issue in his post-trial motion which was denied. (R. 68, 85, 84)

The United States Court of Appeals for the Fifth Circuit has stated in *Gibson* v. *United States,* 363 F 2d 146 at 148:

> "In all instances where substantial or fundamental rights have been affected by hearsay, or other inadmissible testimony, reversible error is committed".

In *Gibson* a government witness had testified without objection to hearsay matters and his opinion that the defendant had stolen the car which was the subject matter of that Dyer Act prosecution. In other words, there was a hearsay opinion that the defendant was guilty.

That is very similar to what happened in this case. Here, Hartley-Leonard testified that a *lawyer* had expressed his legal opinion that there was a violation of the law in this matter. That testimony was clearly hearsay, irrelevant and immaterial to this case and has been admitted to be such by the government (See the Government's Brief at page 4).

The defendant in this case has certain substantial and fundamental rights including the rights to receive a fair and impartial trial before a jury which has not been prejudiced against him by hearing inadmissible hearsay opinions that in fact a crime has been committed in this matter. Of course the basis behind the inadmissibility of such testimony is the defendant's fundamental right to confront and cross-examine the witnesses against as secured to the defendant by the Sixth Amendment to the Constitution of the United States.

It is argued by the defendant that the testimony in question was extremely prejudicial having been a legal opinion that a crime had been committed which clearly invade the province of the jury, and for which there was no cure other than a mistrial.

The Fifth Circuit has stated in *McMilliam* v. *United States,* 363 F 2d 165 at page 167 discussing certain hearsay testimony:

> "Appellants contend that the damage was done, that they had been unduly prejudiced in the eyes of the jury by this admittedly irrelevant, hearsay evidence. *We agree.*" (Emphasis added)

The Court went on to point out that it had previously held in the case of *Landsdown* v. *United States,* 348 F 2d 405:

> ". . . that where law enforcement personnel testified that they had received a radio call in connection with attempts to sell some jewelry by two suspects, one of which was the appellant there, and that a burglary complaint had come in over the telephone, such testimony was irrelevant to the case, inadmissible as hearsay, and so unduly prejudicial as to constitute *plain error* under Fed.R. Crim.P. 52(b)." (363 F 2d at 167)

This was so even though the defendant Landsdown had not objected (348 F 2d at 412).

Other Circuits have ruled similarly regarding unobjected hearsay evidence: *Cannady* v. *United States,* D.C. Cir., 351 F 2d 796; *Glenn* v. *United States,* 6 Cir., 271 F 2d 880; and *United States* v. *Camporeale,* 2 Cir., 515 F 2d 184, to mention a few.

The government admitted in its answering brief before the trial court that the testimony was "irrelevant and immaterial" and "a conclusion". (R. 77)

The issue to be decided by this Court is whether there was inadmissible evidence (and the government has admitted this) which was so prejudicial and invasionary of the jury's province as to deny the defendant substantial and fundamental rights.

As in all criminal cases, the jury had two essential matters to determine, i.e., was a crime committed and did the defendant do it.

Allowing the jury to hear a hearsay legal opinion of a lawyer who was not present and could not be examined to the effect that a crime had been committed clearly invaded the jury's province and would prejudice them in their decision on this essential matter. The defendant's fundamental rights guaranteed by the Constitution to a

fair and impartial trial by jury, due process, and the right to confront and cross-examine the witnesses against him have been violated.

The Fifth Circuit in *Gibson,* supra, determined that similar hearsay testimony even though unobjected to required a new trial and that result should again be had here.

II.

THE COURT ERRED IN FAILING TO ANSWER THE JURY'S INQUIRY.

As is made clear by the affidavit attached to the defendant's post-trial motion the jury indicated to the trial Court it required reinstruction as to the statute and the exemptions. (R. 70)

Yet the Court never responded to this request.

> "Discharge of the jury's responsibility . . . depended on discharge of the jury's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria. *When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy*". (Emphasis Added)
>
> *Bollenback* v. *United States,* 326 U.S. 607, at 612-13, 66 S. Ct. 402, 405, 90 LEd 350.

The Fifth Circuit has held that where a difficult issue is involved in a superficially simple but actually complex statute it is the duty of the trial court to respond to the jury inquiry and clear away any doubts. *Bland* v. *United States,* 299 F 2d 105.

As is illustrated in Argument II the issue involved under the exemptions is really complex. The jury sought enlightenment but did not receive it.

The conviction herein should be reversed.

III.

THE EVIDENCE WAS INSUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT RECEIVED A THING OF VALUE AT OTHER THAN THE PREVAILING MARKET PRICE IN THE REGULAR COURSE OF BUSINESS THAT WOULD HAVE BEEN AVAILABLE TO OTHERS IN SIMILAR CIRCUMSTANCES.

The only real issue at trial was whether the discounted room rate that the defendant along with a number of other persons received was a thing of value which was not paid for by the defendant at the "prevailing market price in the regular course of business". (29 U.S.C. 186(c)(3))

Counsel for the appellant has been unable to find any case that directly treats this issue and in particular has been unable to find any case that defines "prevailing market price in the regular course of business".

"Market Price" has been defined as meaning "the price at which a seller is ready and willing to sell and a buyer ready and willing to buy in the ordinary course of business". (Black's Law Dictionary-Revised Fourth Edition)

It would seem obvious that the "prevailing market price in the ordinary course of business" has to depend on the commodity involved, the market involved, and all other economic factors.

It is well known that the same items are sold at different prices to different people in different markets at different prices. An analogous situation might be where a person goes into a new car dealer. Each car comes from the dealer with a manufacturer's price on the window. Yet, it is argued that not even the government would ar-

gue that price is the prevailing market price. Each person coming in will negotiate the price he will pay and certainly if he is buying multiple items he will receive a lower price.

Hotel rooms are in the same category. As was testified to by Lawrence Edward Lockner, Jr., the general manager of the Sheraton Biltmore Hotel in Atlanta, hotels have different rates for different groups as well as depending on the particular time of the year and how badly the hotel needs people. They will set up special rates. (Tr. 251-252)

The Sheraton Biltmore is certainly part of the Atlanta market and in competition with the Regency Hyatt House. Mr. Lockner testified that rates for single rooms for Department of Labor Employees in the indictment period was "around twelve and seventeen". Mr. Botbol, the person who set the rate given Schiffman and the others testified that he took into effect the fact of the economic benefits to the hotel meaning the room rate revenue, the food and beverage and the competition within the Atlanta market. (Tr. 59)

Further, Mr. Botbol certainly thought that the setting of the rate was "casual and customary" with "no special significance". (Tr. 58)

There was nothing secretive or underhanded about the matter. Mr. Botbol certainly did not feel he was bribing or being extorted.

At least one court found those facts to require a finding of not guilty where there was no secretiveness, not designed as an intimidation or extortion, nor an attempt to bribe the union official involved or to gain control over the union, *United States* v. *Motzell,* 199 F. Supp. 192, at 198.

Also, as pointed out in *Motzell,* the statute (29 U.S.C. 186) also applies to employers, yet the *only* person charged here is Herbert Schiffman, while he was not the only one to receive the discount rate and certainly the rate was granted by the employer.

It might be noted in passing that while the rate was being extended, the defendant successfully negotiated an addendum to the collective bargaining agreement which had not terminated and which had a no strike clause. (Tr. 255-259)

It is suggested to this Court that after a full and fair comparison of all of the evidence there is a doubt as to the willfulness of Schiffman's actions and as to whether they fall under the exemptions of 29 U.S.C. 186 and thus this Court should reverse.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully submits that this Petition For Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Herbert David SCHIFFMAN,
Defendant-Appellant.
No. 76-3742
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.
May 26, 1977.

Defendant was convicted in the United States District Court for the Northern District of Georgia at Atlanta, Charles A. Moye, Jr., J., of violating a statute which makes it unlawful for a labor union official to accept a "thing of value" from an employer of employees whom the union official represents. The Court of Appeals, Brown, C. J., held that: (1) it was harmless error for the trial court to allow the jury to hear a hearsay legal opinion of a lawyer and to fail to answer the jurors request that it reinstruct the jury as to the wording of a statute, and (2) defendant's conviction was supported by the evidence.

Affirmed.

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* Rule 18, 5 Cir.; *see Isbell Enterprises, Inc.* v. *Citizens Casualty Co. of New York et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

1. Criminal Law—1174(1)

Harmless error resulted when trial court failed to declare mistrial on its own motion following hearsay statement by witness concerning a lawyer's legal opinion.

2. Criminal Law—1039

Plain error did not occur when trial court in criminal prosecution failed to answer jurors' request that court reinstruct jury as to wording of statute under which defendant was being prosecuted.

3. Labor Relations—1060

Labor union official's conviction of unlawfully receiving "thing of value" from employer of employees whom union official represented was supported by evidence that he obtained preferentially low rates when he stayed for extended period at "union" hotel. Labor Management Relations Act, 1947, § 302(b), 29 U.S.C.A. § 186(b).

Appeal from the United States District Court for the Northern District of Georgia.

Before BROWN, C. J., and RONEY and HILL, Circuit Judges.

JOHN R. BROWN, Chief Judge:

Appellant was convicted upon trial by jury of one count of violating 29 U.S.C.A. § 186(b), which makes it unlawful for a labor union official to unlawfully, willfully, and knowingly request, demand, receive or accept a "thing of value" from an employer of the employees whom the union official represents. Appellant argues that (i) the trial court committed plain error by not declaring a mistrial following the admission of a hearsay statement by a government witness, (ii) the trial court committed error

in failing immediately to answer an inquiry from the jury, and (iii) there was not sufficient evidence to support the verdict. We disagree and affirm.

Appellant was president and administrative agent of the Miami Local Hotel and Restaurant Employees and Bartenders Union, and was vice-president of the same International Union. In June 1973, in connection with the campaign to organize certain "non-union" hotels, appellant made a trip to Atlanta, Georgia. While in Atlanta, appellant made arrangements to stay at the only major "union" hotel in the city, the Hyatt Regency Hotel.

In arranging for his stay at the hotel, appellant spoke to the general manager of the hotel and informed him that several Union executives would be staying at the Hyatt at various times during the year and that they would like a special rate. The general manager testified that he offered the corporate rate, but that the appellant asked for a better rate of $16.00 a night. The general manager testified that the hotel normally gives the same corporate rate to all corporations which meet certain standards. Once the rate is set, there is normally no further negotiating with individual corporations despite the enormous volume of business which a few of the corporations give to the Hyatt Hotel chain. On November 7, 1973 the corporate rate for the Hyatt Regency in Atlanta was $31.00 for a single room and $38.00 for a double room.

Nevertheless, the general manager testified that he agreed to give appellant and other Union members in his party a rate of $16.00 a night, despite the fact that appellant probably would not even qualify for the corporate rate. Furthermore, this low rate was well below the "break-even" point of the hotel, since, if the hotel had

operated on a 100% occupancy rate of $16.00 a room, the hotel would not have even been able to pay off its lease payments on the building.

Appellant stayed in the hotel for 80 nights during the period between June 21, 1973 and April 13, 1974. The difference between the amount which he did pay ($1,419) and what he should have paid ($2,697) was $1,278. The government instituted this charge against appellant, claiming that appellant's demand for this "special rate" (and the subsequent savings which it generated) was in violation of 29 U.S.C.A. § 186(b).

[1] Appellant initially contends that the trial court committed plain error by failing to declare a mistrial on its own motion following a hearsay statement made by the general manager of the Hyatt Hotel in Atlanta. The general manager testified that during January 1974, two men from the Justice Department requested permission from him to inspect the record on all the Union representatives that it had staying at the hotel. The general manager notified appellant of the actions of the Justice Department and informed him that the officials were particularly interested in knowing about the Hyatt's room rates and those being offered to the Union representatives. When he sensed that the Justice Department might have been interested in more than the travel records of Union representatives, he asked the official if it were possible that the Hyatt might be in trouble. Before testifying further, the prosecutor interrupted the witness, but before asking another question, the defense attorney interjected: "Excuse me, I suggest that the witness be allowed to answer, continue with his answer." Thereupon, the witness continued, saying

> "I asked, 'is there any possibility that we could be in trouble?' His answer to me was: 'It's not my position to advise you on legal matters,' and that seemed to me a little evasive answer as opposed to just turning around and saying 'yes' or 'no.' So I called Art Stokes, who is our attorney from Branch and Swan, who have been our attorneys ever since we've been in town. Art Stokes said something to the effect of '. . ., yes. It's illegal. It's against a thing called the Taft-Hartley Act, and find out where it came from.' "

Appellant contends that allowing the jury to hear a hearsay legal opinion of a lawyer who was not present and could not be examined that a crime had been committed clearly invaded the jury's province and deprived him of a fair trial. He admits that no objection was made to this testimony but asserts that there was no cure for the admission of this testimony other than to declare a mistrial. We disagree. Viewing the evidence under a plain error standard, the error appears harmless beyond a reasonable doubt. *See, e. g., United States* v. *Resnick,* 5 Cir., 1973, 483 F.2d 354.

[2] Appellant also argues that the trial court erred in failing to answer a juror's request that the Court reinstruct the jury as to the wording of the statute involved which had been read to them in the original instructions. No objection was made at the time by counsel for defendant. The contention was first raised in appellant's post-trial motion for the Court to reconsider its denial of its motion for judgment of acquittal or in the alternative for a new trial. The jury was sequestered at 11:30 a. m. At 11:50 a. m., the jury requested that the statute be reread to them. The Marshal informed the trial judge of the jury's request. However, the trial judge was then in the

process of selecting a jury for another trial. Accordingly, the Judge advised the Marshal to return to the jury room after speaking with the respective attorneys and advised the jury that he would read the statute to them at 12:30 p.m. that day. Five minutes after being informed of this by the Marshal, the jury returned a guilty verdict.

In light of the failure of the defendant's counsel to object or even to request the Court to reinstruct the jury before a verdict was accepted, we must review this claim under a plain error standard. Under that standard, we find no plain error.

[3] Finally, defendant argues that there was not sufficient evidence to sustain his conviction. We disagree. The fact that appellant received the $16.00 rate through negotiation with the general manager is undisputed. Also undisputed is the fact that appellant requested a special rate below the corporate rate, though he probably did not qualify even for the lower corporate rate. The jury could properly have reached the conclusion that the savings resulting to appellant from the special rate was a thing of value demanded by appellant from the hotel, in violation of the statute. Under these circumstances, we conclude that the evidence was sufficient to support the jury's verdict.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 76-3742

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

HERBERT DAVID SCHIFFMAN,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

ON PETITION FOR REHEARING
(June 29, 1977)

Before BROWN, Chief Judge, RONEY and HILL, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:
/s/ *Brown*
CHIEF JUDGE